

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 841 OF 2019

1. Kisan S/o Damaji Naik
Age :- 37 years, Occu:- Labour,
 2. Ramesh S/o Abidas Vasave
Age :- 36 years, Occu:- Labour
Both R/o Vagada, Tq. Navapur,
Nandurbar
- ...Appellants
(Original Accused)

Versus

1. The State of Maharashtra
Through Visarwadi Police Station,
Taluka:- Navapur, District. Nandurbar
 2. X, Y, Z. Through Suresh Gavit,
Age : Major, Occu : Edn.
R/o : Mothi Kadwan,
Tq. Navapur, Dist. Nandurbar
- ...Respondents

Mr Chaitanya C. Deshpande, Advocate for Appellants
Mr S.P. Deshmukh, APP for Respondent No.1/State
Ms Shital E. Waghmare, Advocate for Respondent No. 2

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 03.08.2022

DELIVERED ON : 28.09.2022

JUDGMENT :

1. Heard finally with consent of both the sides at admission stage.
2. Feeling aggrieved by the impugned Judgment and order of conviction rendered by the learned Sessions Judge, Nandurbar in Sessions Case No.01/2018, thereby convicting the appellants/original accused Nos. 1 and 2 for the offences punishable under sections 376(1), 341, 506 and 109 of IPC and under sections 4, 12 and 17 of the

Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for the sake of convenience), original accused Nos. 1 and 2/appellant Nos. 1 and 2 have preferred this appeal by taking aid of section 374(2) of the Cr.PC.

3. The prosecution story in brief may be unfolded as under :-

(a) The victim girl (hereinafter referred to as 'the X' was stated to be 16 years and 5 months old at the time of incident and resident of village Mothe Kadwan, Tq. Navapur, Dist. Nandurbar. She was taking education in science faculty in 11th Std. in Agriculture High School, Khandbara. She used to attend her Agriculture High School, Khandbara by boarding the bus daily from her village.

(b) On 14th December, 2017, the victim girl X had been to her school as a regular routine. At about 9.00 a.m., she went to Bazar/market of Khandbara. She met with Soham Guru Naik, a boy resident of another village Kelipada, but taking education in the same High School. His friend Rahul is also resident of Kelipada. Both of them had come on one motorcycle. Soham asked the victim girl to sit on the motorcycle since he wanted to talk with her. The victim girl X refused to sit on the motorcycle by stating that she had to attend her class. But Soham insisted to accompany him. As such, the victim girl agreed to accompany him. Rahul was on front seat. Soham sat in the middle and the victim girl sat behind Soham. Rahul was driving the motorcycle. They went to village Wagda. After crossing distance of about 2-3 kilometers ahead of village Wagda, motorcycle was stopped. Soham and victim girl went inside the forest

area. Rahul stayed near the motorcycle. Soham and victim girl after going inside the dense forest, sat beneath a tree. Soham wanted to talk with the victim girl. They were chit-chatting. Soham snatched certain photographs in his mobile. It was about 10.00 a.m. Soham and victim girl started returning to the spot where Rahul was standing with motorcycle.

(c) Two unknown persons came across along with Rahul. Out of them, one person was dark and fat (Accused No.2) and another person was slim (Accused No.1). The fat person was armed with an axe in his hand. They took them towards valley. Those two persons instructed to the victim girl to undress when she refused. They terrorized the victim girl and her friend Soham to kill them. The victim girl and Soham undressed themselves. The slim person asked victim girl to spread odhani on the ground and asked the victim girl to sleep over it and asked Soham to commit rape upon victim girl, but Soham refused. When the said fat man armed with an axe stood by-side of Soham and another person removed his clothes, and committed rape upon the victim girl. She was raising shouts and cry but there was nobody to respond as it was a forest area. The victim girl on the pretext of urination woke up and put on her underwear and after wrapping odhani, sat for urination nearby the place and thereafter, ran away towards the road. Both unknown persons followed her and asked her not to go road side. The dark complexion man went away on motorcycle towards opposite direction of village Wagda and the slim person went towards direction at village Wagda.

(d) The victim girl noticed one motorcycle coming on the road and stopped him. Thereafter, the victim girl narrated the incident to the person, resident of Navapada. In the meantime, Soham and Rahul approached there with remaining clothes of the victim girl. She put on her clothes. The victim girl, her friend Soham and Rahul came to the village of victim girl. They dropped the victim girl at her house.

(e) The victim girl narrated the incident to her mother and sister. After return of her father to home, the incident was also narrated to the father. Thereafter, the victim girl along with her parents and sister came to Visarwadi Police Station and lodged the FIR against the said two unknown persons vide Exh. 16.

(f) On the basis of FIR lodged by the victim girl, Crime No. 246/2017 came to be registered at Visarwadi Police Station under sections 376(1), 341, 120B, 506 and 109 of IPC and under sections 4, 8, 12, 14, 17 of the POCSO Act. The FIR came to be registered on the day of incident i.e. on 14.12.2017 about 22.45 hours. On 15.12.2017, the supplementary statement of the victim girl came to be recorded whereby she gave in-detail description of those two unknown persons with their clothes. She had disclosed to the Police that the person, who had committed rape on her, was slim and was wearing sky colour T-shirt having image/picture of a man over it and Barmuda and fat man was wearing blue colour shirt and full pant. The victim girl produced her clothes before the Police. It came to be seized under panchanama.

(g) The victim girl was referred for medical examination and medico legal certificates were collected. The bonafide certificate of the victim girl was also obtained from her school.

(h) On 15th December, 2017, the Investigating Officer visited scene of offence along with the victim girl and two panchas and prepared the panchanama of scene of offence. The slip of the victim girl was found at the scene of offence which was identified by her and same was seized. The soil from the scene of offence also came to be seized.

(i) On the basis of description given by the victim girl, both the accused came to be arrested on 15.12.2017 under arrest panchanama. The statements of witnesses were recorded by the Investigating Officer.

(j) On 23.12.2017, test identification parade was conducted in the office of Executive Magistrate/Tahsildar, Navapur. In the said exercise of test identification parade, the victim girl had identified both the accused persons. The statement of victim girl under section 164 of Cr.PC came to be recorded by the learned Judicial Magistrate First Class, Navapur. The accused persons were also subjected to the medical examination and their medico legal certificates were collected. The sketch map of the scene of offence came to be prepared. The seized muddemal articles were sent to the Chemical Analyzer including clothes of the victim girl and clothes of the accused. The vaginal swab etc. of the victim girl were also sent to Chemical Analyzer for report.

(k) After completion of investigation, the charge sheet came to be filed against both the accused persons for the above said offences. The learned JMFC, Navapur committed the case to the Sessions Court, Nandurbar in view of the offences exclusively triable by the Court of Sessions.

(l) Both the accused/appellants appeared before the Sessions Judge, Nandurbar. The learned Sessions Judge, Nandurbar was pleased to frame the charge against both the appellants/accused under sections 376(1), 341, 120B, 109 and 506 of IPC and under sections 3, 4, 11, 12, 16 and 17 of the POCSO Act. Both the appellants/accused were pleaded not guilty to the charge and they claimed to be tried. The trial was commenced before the learned Sessions Judge, Nandurbar. The prosecution agency has examined in all 9 witnesses including victim and Investigating Officer, eye witness, independent witness and pancha witnesses and closed its evidence. The statement of both the appellants came to be recorded under section 313 of Cr.PC. Both the appellants defended that they have been falsely implicated in this case. The victim girl had love affair with Soham, a boyfriend. On the date of incident, both of them had been to the forest area. Soham had sexual intercourse with the victim girl. In order to rescue from the said love affair and the incident of sexual intercourse, the victim girl, Soham and Rahul had made a plan and accordingly, they have been falsely implicated in this false case of rape.

(m) The learned Sessions Judge after considering the evidence on record and argument advanced on behalf of both the sides, was pleased to hold both the appellants/accused guilty under various offences of IPC and under the Penal Sections of POCSO Act. However, acquitted both of them for the offence of criminal conspiracy punishable under section 120B of the IPC. The following is the order of sentence awarded by the Sessions Judge, Nandurbar against appellant Nos. 1 and 2.

(1) The accused No.1 Kisan Damaji Naik is hereby convicted for the offence punishable under section 376(1) of the Indian Penal Code so also for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act and he is sentenced to suffer Rigorous Imprisonment for Ten years and to pay fine of Rs.10,000/- (Rs. Ten thousand only) in default, to suffer Simple Imprisonment for Six months.

(2) The Accused No. 2 Ramesh Abidas Vasave is hereby convicted for the offence punishable under section 109 of the Indian Penal Code so also for the offence punishable under Section 17 of the Protection of Children from Sexual Offences Act and he is sentenced to suffer Rigorous Imprisonment for Ten years and to pay fine of Rs.10,000/- (Rs. Ten thousand only) in default, to suffer Simple Imprisonment for Six months.

(3) The accused No.1 Kisan Damaji Naik and accused No. 2 Ramesh Abidas Vasave are also convicted for the offence punishable under Section 341 r/w. 34 of the Indian Penal Code and they are sentenced to suffer Simple Imprisonment for One month each.

(4) The accused No.1 Kisan Damaji Naik and accused No.2 Ramesh Abidas Vasave are further convicted for the offence punishable under Section 506 r/w. 34 of the Indian Penal Code and they are sentenced to suffer Rigorous Imprisonment for Two years each and to pay fine of Rs.2,000/- (Rs. Two thousand only) each in default, to suffer Simple Imprisonment for two months.

(5) The accused No.1 Kisan Damaji Naik and accused No.2 Ramesh Abidas Vasave are further convicted for the offence punishable under Section 12 of the Protection of Children From Sexual Offences Act and they are sentenced to suffer Rigorous Imprisonment for One year each and to pay fine of Rs.1,000/- (Rs. One thousand only) each in default to suffer Simple Imprisonment for One month each.

(6) The accused No.1 Kisan Damaji Naik and accused No.2 Ramesh Abidas Vasave are hereby acquitted for offence punishable under Section 120-B of the Indian Penal Code.

(7) All the sentences of imprisonment shall run concurrently.

(8) The accused No.1 and 2 are in jail since 15-12-2017, therefore set off is granted to them for the period already undergone, as per provisions of section 428 of the Code of Criminal Procedure.

(9) Out of the fine amount, an amount of Rs.25,000/- (Rs. Twenty five thousand only) be paid to the victim as per provisions of Section 357(1) of the Code of Criminal Procedure, after appeal period is over.

(10) The seized muddemal i.e. article No.1 to 14 being worthless, be destroyed after appeal period is over.

(11) The seized muddemal article No.15 Suzuki Max-100 motorcycle bearing chassis No. 9904F284702 and Engine No.9904M333231 be returned to its registered owner after appeal period is over.

Sd/-
Sessions Judge, Nandurbar,
Dist. Nandurbar

(n) Both the appellants have assailed the impugned Judgment and order of conviction passed by the Sessions Judge, Nandurbar by way of this appeal on various grounds.

4. Heard Mr Chaitanya Deshpande, learned counsel for the appellants/accused Nos. 1 and 2 and Mr S.P. Deshmukh, learned APP for the State/respondent and Ms Shital E. Waghmare, learned counsel for respondent No. 2 at length.

**SUBMISSIONS OF MR CHAITANYA DESHPANDE,
LEARNED COUNSEL FOR THE APPELLANTS/ACCUSED**

5. Mr Deshpande, learned counsel for the appellants vehemently submitted that the learned Sessions Judge, Nandurbar has not scrutinized the evidence in a proper perspective and arrived at erroneous conclusion. He submitted that the testimony of the prosecutrix is unworthy of credence. He submitted that the conduct of the victim girl appears to be very much unnatural. If the victim girl and Soham really wanted to talk about their education, there was no reason for them to go to dense forest area. He submitted that the role of Soham is also highly suspicious. His evidence is also unreliable. He submitted that if accused No. 1 wanted to commit rape on the prosecutrix/victim girl, there was no reason for him to

threaten Soham to remove his clothes and then commit rape on the victim girl. He submitted that the story tried to be put forth by the prosecution is unbelievable whereby it is attempted to establish that after the alleged rape, the victim girl ran away upto the road and stopped one motorcycle, who was the witness Devaka Katudya Padv.

6. Mr Deshpande, learned counsel for the appellants/accused submitted that as regards the alleged incident, the statements of witnesses are at variance on material aspects. He pointed out that the statement of Soham and Rahul are also at variance and both witnesses are unworthy of credence. He pointed out that the victim girl has not admitted her friendly relations with Soham. The victim girl has denied the suggestions to that effect of her love affair with Soham whereas PW No.2 has stated that prior to the date of incident, they were in contact with each other which indicates about love affair between them which is suppressed by the victim girl.

7. Mr Deshpande, learned counsel submitted that the statement of victim girl recorded under section 164 of the Cr.PC by the JMFC, Navapur is not in tune with the evidence of victim girl recorded before the Sessions Court.

8. Mr Deshpande, learned counsel vehemently submitted that both the accused were unknown to the victim girl as well as her friends. As such, test identification parade plays important role in this case. He submitted that the Executive Magistrate has not followed the mandatory provisions before conducting the test identification parade. He has not

followed the guidelines for conducting test identification parade given in the criminal manual. It was necessary to have a independent identification parade of respective accused, but common test identification parade seems to have been conducted. Even minimum number of dummy persons were not made available along with the accused for test identification parade. The test identification parade conducted in this case suffers major flaws. There was go-bye to the mandatory provisions before conducting test identification parade. As such, test identification parade conducted in this case is not at all reliable. It cannot be accepted. The Executive Magistrate who has conducted test identification parade is also not examined in this case. It is very much fatal to the prosecution case.

9. Mr Deshpande, the learned counsel further submitted that though the statement of sarpanch of village Mothe Kadwan recorded by the JMFC, Navapur under section 164 of Cr.PC, he was not examined before the Sessions Court which creates serious doubts about the prosecution case.

10. Mr Deshpande, learned counsel for the appellants vehemently submitted that the prosecution has miserably failed to prove the above said charges against both the appellants/accused beyond reasonable doubt. The medical evidence is not supporting to the prosecution case. The chemical analysis reports also do not support to the prosecution case. In the above background, both the appellants/accused are liable to be acquitted by giving them benefit of doubt.

11. Mr Deshpande, learned counsel for the appellants/accused has placed his reliance on the following stock of citations on the point of test identification parade.

- (i) ***Siraj Shahabuddin Khan Vs. The State of Maharashtra and Ors. reported in 2017 (6) Mh.LJ (Cri.) 123***
- (ii) ***State of Goa Vs. Sanjay Thakran and Anr reported in 2007(2) SCC (Cri.) 162***
- (iii) ***Ravi @ Ravichandran Vs. State reported in 2007 AIR (SCW) 2740***
- (iv) ***Prakash @ Buddha Ramchandra Shinde Vs. The State of Maharashtra with connected Criminal Appeals decided by the Division Bench of this Court at Principal Seat vide Judgment dated 5th October, 2021.***

SUBMISSIONS OF LEARNED APP

12. Per contra, Mr S.P. Deshmukh, learned APP for the State strenuously argued that the prosecution machinery has examined all the important and relevant witnesses in this case. The prosecution has proved the charges against both the appellants by adducing cogent and unimpeachable piece of evidence. Whatever minor omissions and contradictions which are pointed out by the learned counsel for the appellants are not any way helpful to discard the testimony of important witnesses namely victim girl, her friend Soham and Rahul. They were the eye witnesses to the incident. He submitted that the entire case is rest upon the direct evidence. In a case of rape, no corroboration is even required, if testimony of prosecutrix/victim is found reliable and trustworthy and inspire confidence of the Court.

13. Mr S.P.Deshmukh, learned APP further invited my attention to the evidence of Medical Officer and submitted that the Medical Officer has given clear finding that the victim girl was subjected to the sexual assault. It is, therefore, clear that the evidence of the victim girl is well supported by the medical evidence. He submitted that both the accused are unknown to the victim girl and her friend. There was no enmity amongst them. There was no reason for the victim girl and her friend Soham to implicate them in a rape case and that too at the cost of reputation of the victim girl. He submitted that the independent witnesses have also supported to the prosecution case.

14. Mr S.P. Deshmukh, learned APP submitted that the identification of both the accused by the victim girl before the Court is a substantive evidence and it needs to be accepted, even though there are flaws in the test identification parade as pointed out by the learned counsel for the appellants.

15. Mr S.P. Deshmukh, learned APP for the State has placed his reliance in case of ***Malkhansingh Vs. State of Madhya Pradesh reported in 2003 DGLS SC 507.***

16. Mr Deshmukh, learned APP vigorously submitted that the learned Sessions Judge has appreciated the evidence of victim girl and her friend Soham and his friend Rahul very meticulously and rightly accepted their evidence since found to be reliable and trustworthy. He submitted that the Sessions Judge has also appreciated the evidence of

the rest of the witnesses very carefully and arrived at correct conclusion and rightly held the appellants guilty under various sections of IPC including rape which is heinous offence. He submitted that at the relevant point of time, the victim girl was minor and hardly 16 years and five months. As such, the learned Sessions Judge has rightly convicted the appellants under the provisions of the POCSO Act, 2012. He submitted that view taken by the learned Sessions Judge while convicting both the appellants, cannot be said to be faulty in the eye of law. The decision rendered by the learned Sessions Judge needs to be confirmed in the appeal. He submitted that no interference is required in the order of sentence awarded by the Sessions Judge. There is no merit in the appeal and liable to be dismissed.

SUBMISSIONS OF LEARNED COUNSEL FOR VICTIM

17. Ms Shital Waghmare, learned counsel for respondent No. 2 argued on the similar lines. She submitted that both the appellants have committed heinous offence. A minor girl from Schedule Tribe was subjected to rape. The trial court has rightly convicted both the appellants by appreciating the evidence in a proper way. No need to interfere in the findings recorded by the learned trial Judge. The conviction needs to be maintained in the appeal.

18. I have considered the submissions of both the sides. I have studied the impugned Judgment and order of conviction rendered by the sessions Judge, Nandurbar in the background of argument advanced by both the sides. I have also gone through the stock of witnesses examined

by the prosecution agency as well as the documentary evidence relied upon.

19. The prosecution machinery has examined following witnesses to prove the charges against the appellants/accused.

- (i) P.W. No.1. Victim girl X Exh. 15
- (ii) P.W. No. 2. Soham Guru Naik Exh. 20
(Friend of victim and eye witness)
- (iii) P.W. No. 3. Rahul Mansing Vasave Exh. 22
(Friend of P.W. No. 2 and accompanied victim and his friend Soham)
- (iv) P.W. No. 4. Hari Govinda Mali Exh. 26
(Panch witness on scene of offence.)
- (v) P.W. No. 5. Sunil Suresh Gavit Exh. 28
(Panch witness on seizure of clothes of victim)
- (vi) P.W. No. 6. Joshila Rangnath Gavit Exh. 32
(Pancha witness on seizure of weapon Axe)
- (vii) P.W. No. 7. Devaka Katudya Padvi Exh. 35
(Independent witness on immediate disclosure of victim)
- (viii) P.W. No. 8. Dr Rahul Ramji Vasave Exh. 38
(Medical Officer, who examined the victim girl)
- (ix) P.W. No. 9. Sangita Kadam Exh. 49
(Lady P.S.I./Investigating Officer, Police Station, Navapur)

20. Apart from the above stock of oral evidence, the prosecution agency has also pressed into service, following stock of documentary evidence.

- (i) F.I.R. - by victim P.W. No.1 Exh. 16
Age – 16 years and 5 months studying in 11th Std. Science
Khandbara Agriculture High School.
- (ii) Statement of victim recorded by the J.M.F.C. Navapur Exh. 18
– 19.12.2027

- (iii) Medical Examination Report in a case of Sexual Assault – Exh. 39
- (iv) Final Medical certificate Exh. 40
- (v) C.A. Report dated 28.02.2018 about clothes of victim and accused - No earth detected.
- (vi) C.A. report Exh. 58 about blood test, pubic hair, vaginal swab and nail clippings of victim.

Nail clippings stained with blood.
- (vii) C.A. report Exh. 59 about blood test, pubic hair and nail clippings of accused No.1 – Kisan
- (viii) C.A. report Exh. 60 about blood test, pubic hair and nail clippings of accused No.2 – Ramesh
- (ix) C.A. report Exh. 61 about analysis of clothes of victim and accused.
Semen detected – underwear of accused No.1
Semen detected - Barmuda of accused No.1
- (x) Seizure Panchanama of clothes of Accused No.1 Exh. 29
- (xi) Seizure Panchanama of clothes of accused No.2 Ramesh – Exh. 30
- (xii) Seizure Panchanama of clothes of victim Exh. 31

21. Before moving to the merits of the appeal, let me place on record one important aspect relating to the defence of the accused/appellants. During the course of trial, both the appellants had moved an application before the Sessions Judge vide Exh.43 to add witness Soham and Rahul as co-accused in this case by taking aid of section 319 of Cr.PC. The learned Sessions Judge, Nandurbar after considering the facts of the case and argument advanced on behalf of both the sides was pleased to reject that application vide order dated 04.09.2018. That order is not challenged by the appellants/accused as per

the record and reached finality which has bearing on the defence of the accused/appellants.

22. In the present case, the appellant No.1/accused No.1 alleged to have committed rape upon the victim girl, who was minor at the relevant point of time and co-accused/appellant No.2 alleged to have abetted accused No.1 in the commission of rape by threatening friend of the victim girl by putting an axe on his shoulder and under constant fear. A woman or a girl who is raped is not accomplice. Corroboration is not the *sine qua non* for conviction in a rape case. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Why should the evidence of the girl or woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? The plea about lack of corroboration has no substance. These are the observations made by the Hon'ble Supreme Court in case of **Bhupinder Sharma Vs. State of Himachal Pradesh reported in (2003) 8 SCC 551.**

EVIDENCE OF VICTIM GIRL

23. In the above background, let me appreciate the evidence of victim girl, who is P.W. No.1. (I do not propose to mention the name of victim in view of mandatory provision of section 228A of IPC).

On going through the evidence of P.W. No.1/victim girl vide Exh. 15, it would reveal that she has narrated the episode in detail. It is

evident that on 14.12.2017 in the morning time, she accompanied P.W. No.2/Soham and P.W. No.3/Rahul and all of them went towards the forest area on motorcycle. Even though P.W. No.1/victim girl has attempted to suppress the relationship with P.W. No.2/Soham, it can be safely inferred that P.W. No. 2/Soham was her boyfriend. Both of them were studying in the same School. P.W. No. 2/Soham has taken her in the nearby forest area so as to talk to her. Accordingly, they came to the dense forest area whereas P.W. No.3/Rahul parked motorcycle on the road and monitoring the meeting from a short distance. P.W.No.1/Victim Girl and P.W. No.2/Soham sat under a tree and were chit-chatting for some time. After 10 to 15 minutes, they started coming back to the spot where P.W. No.3/Rahul was standing on the road with motorcycle.

24. It is further evident that accused Nos. 1 and 2 came across on the way. She has disclosed the description of both the accused in detail. Accused Nos.1 and 2 taken them towards the valley portion. Rahul/P.W. No.3 was also in their company. It is further evident that victim girl, P.W. No.2/Soham and P.W.No.3/Rahul requested both the accused to let them go by saying that they may take their mobiles. However, accused No.2 was armed with an axe in his hand, put the axe on the shoulder of Rahul. Accused No.1 asked the victim girl and P.W.No.2/Soham to undress themselves when both of them refused. Accused Nos. 1 and 2 threatened to both of them to kill, if they did not remove their clothes. Out of fear, victim girl and Soham removed their clothes. Accused No.1 asked to the victim girl to spread her odhani on the ground. Accused No.1 asked to the victim girl to sleep on the said odhani. Accused No.1 further asked to

Soham to commit rape on the victim girl when Soham refused. Accused No. 1 asked the Soham to get aside by saying that he will rape. Accused No.1 committed rape on the victim girl. The victim girl was shouting and crying but there was no one to rescue her as it was a dense forest area.

25. The victim girl asked to the accused No.1 that she wanted to urinate and accordingly, the victim girl urinated nearby place and accused No.1 was waiting nearby side. The victim girl put on her nicker and picked up odhani and started running towards road side by wrapping the odhani around her. She ran towards the area where motorcycle was parked. Accused Nos. 1 and 2 chased her and gave mobile of Soham and Rahul and asked her not to go to the road side area. Accused No.2 went to the opposite direction of village Wagda on motorcycle and accused No.1 went towards Wagda.

26. The testimony of victim girl further reveals that she met with one person (P.W. No. 7/Devaka Katudya Padvi) on the road, who was from village Navapada as she stopped his motorcycle by giving signal and disclosed about the incident. P.W.No. 7/Devaka Padvi made phone call to Sarpanch of Mothe Kadwan and asked him to come on the spot and take away the victim girl. He asked Rahul and Soham to accompany the victim girl while going either to Khandbara or Visarwadi Police Station and informed that Sarpanch is also coming.

27. It is further revealed that Rahul and Soham along with victim girl came to the house of the victim girl. The victim girl disclosed the episode of rape committed by accused No.1 with the help of accused No.2. On the

very day, the victim girl along with her parents rushed to the Police Station, Visarwadi and put the law in motion by lodging FIR which is vide Exh.16.

28. The testimony of the victim girl is tried to be shaken on the ground of her unnatural conduct. She did not raise hue and cry at the time of incident of rape much less resisted. I do not find any merit in such line of defence. As pointed out earlier, boyfriend of the victim girl, though present there, accused No. 2 had put an axe on his shoulder and put him under fear of instant death. The situation was such a terrific, though Soham really intended to help his girl friend, he was compelled to standstill because of threat to his life by putting an axe on his shoulder. Secondly, though victim girl raised hue and cry, there was no response as the scene of offence was located in the dense forest area. If the scene of offence which is situated in the dense forest area coupled with the act of accused No.2 in abetting accused No.1 for committing rape, there was no scope either to the victim girl or her boyfriend to rescue from the scene of offence. The victim girl was simply helpless. Accused No.1 by taking undue advantage of situation, has committed rape on the victim girl by putting her boyfriend of instant death.

29. P.W. No. 7/Devaka Katudya Padvi vide Exh. 35 is an independent witness to whom victim girl has made immediate disclosure of the incident. P.W.No.7/Devaka Padvi has categorically stated in his evidence that when he was going nearby forest area of Wagda, a girl came in front of his motorcycle by crying and shouting to help her ('Baba

mala vachava, Baba mala Vachava'). She was wearing only nicker and odhani. Her condition was very bad and pathetic and she was in tears. It is therefore, clear that the natural conduct of the victim girl is brought on record through the evidence of P.W. No.7/Devaka Padvi to whom she had made immediate disclosure about the incident.

30. The victim girl had faced the lengthy cross-examination and with courage disclosed about the episode of rape. She has disclosed in detail about the participation and involvement of accused Nos. 1 and 2 in the commission of such offences. She has also identified both the accused before the Court. It was attempted to establish by the defence side as to why the victim girl went to the forest area with Soham and Rahul, why she did not refuse to join their company. Again, I do not find any force in that line of cross-examination and defence. As pointed earlier, the victim girl and P.W.No.2/Soham were dating. Soham requested to the victim girl to accompany him and accordingly, both of them went nearby the forest area, perhaps, for some romantic talk which they had dreamed but unfortunately, met with this incident. It was further attempted by the defence side to show that the victim girl and Soham did not raise any shouts when they saw both the accused. She had answered that she was frightened after seeing both the accused and she had attempted to run away but both the accused caught them.

31. It was attempted by the defence side to show why Soham and Rahul did not disclose the incident to the parents of the victim girl and why they alone left the victim girl at her house. Again, there is no merit in that

defence. Both of them had not left the victim girl alone at the spot. They accompanied the victim girl upto her house, and thereafter, they went away. The conduct of Soham and Rahul cannot be said to be objectionable.

32. It is further evident from the record that the statement of the victim girl came to be recorded by the JMFC, Navapur on 19.12.2017 under section 164 of Cr.PC. She has repeated the episode of rape before the learned Magistrate while recording statement under section 164 of Cr.PC. The evidence of the victim girl before the trial court and the statement given by the victim girl before the learned Magistrate under section 164 of Cr.PC are found consistent about the incident of rape. There is no material variance. She has disclosed about the role played by the accused No. 1 and accused No. 2 as well. She has also given the description of the accused persons as well as their clothes. She has narrated the incident to P.W. No.7 Devaka Padvi, who was passing by the road near the forest which reflects natural conduct of the victim girl. On careful scrutiny of the evidence of victim girl, it is revealed that her evidence is trustworthy, reliable and unimpeachable. She had no reason to falsely implicate accused Nos. 1 and 2 in heinous offence. For the first time, she had seen both the accused persons in the forest area when they committed such heinous offence. The victim girl had sufficient time to notice the figure, description and clothes of respective accused, and as such, she has narrated the same during her evidence before the trial court as well as while recording statement under section 164 of Cr.PC. The learned trial Judge has rightly relied upon the testimony of the victim girl.

MEDICAL EVIDENCE

33. The prosecution has examined P.W.No. 8 Dr Rahul Ramji Vasave, Medical Officer vide Exh. 38, who has examined the victim girl. On going through the testimony of Dr. Vasave, it is revealed that medical evidence is also supporting to the prosecution case. Dr. Vasave has examined the victim girl on 14.12.2017 around 11.30 p.m. The victim girl has given the history of sexual assault on her on 14.12.2017 between 10.00 a.m. to 10.30 p.m. Accordingly, the history of the victim girl has been recorded in the case papers.

34. On physical medical examination of the victim girl, Dr. Vasave recorded following findings :-

- (i) Abrasion over left breast at the left lateral quadrant admeasuring 3 X 1 c.m.
- (ii) Abrasion over lower abdomen below umbilicus and it was admeasuring 3 X 1 c.m.
- (iii) Injuries to the private part i.e. genital area mentioned in column No.12 of the medical examination report in sexual assault vide Exh. 39.
- (iv) Labia Majora :- Edematous, swollen and torn
- (v) Labora minora :- bruised
- (vi) Forechette :- torn
- (vii) Perineum :- congested
- (viii) Vagina and Cervix :- Torn, edematous and tender.

35. Dr Vasave has also given final opinion after receiving reports of Chemical analyst which is vide Exh.40. He gave opinion that overall findings given by him in medial examination report for sexual assault vide

Exh. 39 are consistent with sexual assault.

36. The defence counsel has attempted to show that Dr Vasave is not a Gynecologist. He is possessing M.B.B.S. degree and diploma in Anesthesia. As such, he is not expert in the field to give opinion in a case of rape. I do not find any merit in that line of defence. While facing the cross-examination, Dr Vasave has admitted that victim was not referred for medical examination for determination of the age and as such, he did not refer the victim girl to the radiologist for age determination. Further, Dr Vasave while facing the cross-examination has stated that the victim had made complaint of pain in the private part. Certain questions were put to Dr Vasave regarding hymen with proposition given in the medical jurisprudence which is not disputed by him. Further, Dr Vasave has given opinion that the injuries noticed by him on the person of victim girl are possible when there is first time sex with or without consent with a boy of 17-18 years. Having regard to the age of the victim girl, if she is subjected to rape by a full grown male then, there is possibility of injuries to the male organ if that male is also virgin. All this material brought on record by the defence side is not any way helpful to discard the medical evidence and the opinion given by Dr Vasave. The testimony of Dr Vasave is found trustworthy and reliable. The testimony of Dr Vasave is supporting to victim girl and corroborated the fact that victim girl was subjected to sexual assault in view of nature of injuries found on the person of victim girl noticed above.

37. It is submitted by Mr Deshpande, learned counsel for the appellants that pubic hairs and vaginal swab were sent to Chemical Analyst for expert opinion. As per the chemical analysis report vide Exh.58, no semen was detected. The chemical analysis report pertaining to accused No.1/Kisan about his blood test, pubic hair, and nail clippings as well as chemical analysis report vide Exh.60 pertaining to Ramesh/accused No. 2 are not any helpful. However, It is not damaging to the prosecution case. The answer to that effect finds place in the cross-examination of P.W. No.8/Dr Vasave. Dr Vasave has stated during the course of cross-examination that when he interacted with victim girl, the victim girl disclosed to Dr Vasave that she had vaginal discharge, but thereafter, she had taken bath and she has washed genital area. As such, it is difficult to get positive findings about presence of semen in the vaginal swab and pubic hairs. Apart from that, the nail clippings of victim girl were also sent to chemical analyst for report. C.A. Report vide Exh. 58 reveals that the nail clippings of the victim girl found stained with blood which is supporting to the prosecution case.

38. Mr Deshpande, learned counsel for the appellants also invited my attention to the C.A. report of the clothes of the victim girl and accused and pointed out that no earth was detected. Even though, no earth was detected on the clothes of the victim girl and accused No.1, as well, testimony of victim girl which is found trustworthy and reliable cannot be questioned in view of C.A. report.

39. There is one more C.A. report vide Exh. 61 about analysis of clothes of victim and accused. On perusing the same, it is revealed that semen was detected on the underwear and barmuda of accused No.1, who has committed the rape on victim girl. This is one more corroborative factor to strengthen the case of prosecution regarding rape on the minor victim girl.

THE EVIDENCE OF EYE WITNESS P.W.NO.2/SOHAM

40. P.W. No.2/Soham Naik vide Exh. 20 is an eye witness to the incident of rape which is exceptional. He was boyfriend of victim girl. On careful scrutiny of the testimony of P.W. No.2/Soham, it would reveal that both of them are acquainted with each other and there was affair. P.W. No.2/Soham has also narrated the incident of rape in detail during his examination-in-chief. He has corroborated the evidence of victim girl/P.W.No.1. He has also disclosed the role played by both the accused in commission of offence of rape with all the details. It is evident that accused No. 2 caught-hold him at the time of rape and put an axe on his neck and accused No.1 committed rape on his girl friend when both of them had been to the forest area near from their high school on 14.12.2017 in the morning about 9.30 a.m. to 10.00 a.m. Certain minor contradictions are brought on record by way of examination of P.W. No. 2/ Soham, which are not any way fatal to the prosecution case. P.W. No.2/Soham disclosed that the victim girl was raising shouts at the time of rape. It was attempted to show that Rahul, who was approximately 10 feet away, did not rush to the spot to rescue the victim girl which is attempted to be capitalized. It is material to note that P.W. No.2/Soham

was put under instant fear of death by putting an axe on his neck and in such a terrible situation, it was unsafe on the part of Rahul to respond to the shouts of victim girl. It was but natural. P.W. No.2/Soham though subjected to lengthy cross-examination, no damaging material is brought on record. On careful examination of testimony of P.W.No.2/Soham, it is revealed that his testimony is trustworthy and reliable and also inspires confidence of the Court. He was a real eye witness to the incident of rape. No manner of doubt can be seen after careful examination of his entire evidence. The learned trial Judge has rightly accepted his evidence, which has strengthened the prosecution case.

41. P.W. No.3/Rahul vide Exh. 20 happens to be the friend of P.W. No.2/Soham and accompanied with victim girl and his friend Soham at the time of incident. Even though, he was not an eye witness to the episode of rape, he was standing at a short distance from the place of offence. He was also threatened by the accused by keeping an axe on his neck and brought him to the forest area where Soham and victim girl were standing. It is evident from his testimony that he heard shouts of victim girl and after a short while, Soham rushed towards him holding clothes of victim girl and informed that accused No.1 has committed rape on victim girl and he was put under constant fear by putting an axe on his neck and anyhow, victim girl ran away on the pretext for urination. P.W. No.2/Soham and P.W. No.3/Rahul went in search of victim girl and she was found on the road when Soham handed over clothes to the victim girl. Nothing is transpired by way of cross-examination of P.W. No.3/Rahul to discard his evidence, which is corroborating to the evidence of P.W.No.2/Soham. The testimony

of P.W. No.3 Rahul is also found to be natural, trustworthy and reliable. It is corroborating to the testimony of P.W.No.2/Soham and P.W. No.1/victim girl X.

42. P.W. No. 4-Hari Govinda Mali vide Exh. 26 is a panch witness on a scene of offence. He has supported to the prosecution case. He has stated that scene of offence was shown by the victim girl and accordingly, Police prepared the panchanama of scene of offence vide Exh. 27. While facing the cross-examination, he has admitted that the panchanama was prepared on the narration of the Police Officer, Ms Sangita L. Kadam and other staff was writing it. It is not anyway damaging to the prosecution case. Clause No. 4.4 of the panchanama of the scene of offence seems to have not written in his presence which pertains to motorcycle which is not any way sufficient to discard the entire contents of the panchanama of the scene of offence. The map of scene of offence is annexed with the panchanama of scene of offence which describes the geographical location of the scene of offence which is situated in the forest area. Thus, the prosecution has also proved the scene of offence.

43. P.W. No. 5 – Sunil Suresh Gavit vide Exh. 28 is a panch witness on seizure of clothes of accused and the seizure panchanama is produced vide Exh. 29 and 30. The victim girl has also identified the clothes of the accused. The clothes of the victim girl also came to be seized in presence of P.W. No.5/Sunil Gavit vide Exh.31.

44. P.W.No.6-Joshila Raghunath Gavit vide Exh. 32 is another panch witness on seizure of weapon/axe and the seizure panchanama is

produced vide Exh. 33. The motorcycle came to be seized in his presence vide Exh. 34.

45. It is pointed out by Mr Deshpande, learned counsel that though statement of village Sarpanch Mothe-Kadwan was recorded by J.M.F.C. under section 164 of Cr.PC., he is not examined before the trial Court. It is not any way fatal to the prosecution case when all the material witnesses have been examined in this case. Only because of Sarpanch, Village Mothe Kadwan is not examined, does not give any scope to raise doubt about the prosecution case.

46. The defence though succeeded in bringing on record certain material through the above referred panch witnesses to question panchanamas referred above, it does not affect the prosecution case. Even keeping aside the evidence in the form of panchanama of the scene of offence, seizure of the clothes of the victim girl and seizure of the clothes of the accused, there is direct evidence on the incident of rape and the same found to be trustworthy and reliable discussed herein before.

47. P.W.No.9/Sangita Leelanand Kadam is a lady P.S.I. vide Exh. 49, who has conducted investigation of this case. She has stated about her procedural part of investigation. Even though certain flaws in the investigation are brought on record by way of cross-examination of the lady Investigating Officer regarding drawing of panchanamas referred above, not fatal to the prosecution case.

TEST IDENTIFICATION PARADE

48. Mr Deshpande, learned counsel for the appellants highlighted the episode of test identification parade conducted by the Investigating Officer. He pointed out, how the test identification parade is not according to the mandatory provisions of criminal manual, how there are flaws in the test identification parade. He has also pointed out that the concerned Executive Magistrate/Tahsildar, who conducted test identification parade is even not examined. Mr Deshpande, the learned counsel has also relied upon the number of citations on the test identification parade.

49. In case of ***Siraj Shahabuddin Khan Vs. The State of Maharashtra*** (supra), this Court at Principal Seat was pleased to acquit the accused by extending the benefit of doubt in view of certain defects in the test identification parade.

50. In case of ***State of Goa Vs. Sanjay Thakran and Anr.*** (supra), the Hon'ble Supreme Court was pleased to observe that when dummy accused persons were not of more or less of the same features and age groups as that of the accused, it is a serious doubt regarding fairness of the test identification parade.

51. In case of ***Ravi @ Ravichandra Vs. State Rep. By Inspector of Police*** (supra), it is held by the Hon'ble Supreme Court that test identification parade held after 10 days of arrest and in the meantime photographers published in the newspaper, such test identification held improper and accused were acquitted by giving benefit of doubt.

52. In case of **Prakash@ Budha Ramchandra Shinde** (supra), the Division Bench was pleased to observe importance of test identification parade and compliance of mandatory provisions of criminal manual and criminal procedure code. The Division Bench was pleased to acquit the appellants by giving them benefit of doubt. However, the facts of the cited case and the facts of the case in hand are slightly different. In the cited case, the Executive Magistrate, who conducted the test identification parade was not examined and only panch witness was examined to prove the fact of test identification parade. In the cited case, both material witnesses in their respective depositions had admitted the position that the actual assailants were unknown, and as such, the test identification parade was held material. It was a case of criminal conspiracy and murder. Even though in the present case, the Executive Magistrate, who conducted the test identification parade is not examined, keeping the test identification parade in cold storage, the substantive evidence of the victim girl, one eye witness and one accompaniment has proved the involvement and participation of both the accused. The medical evidence is also corroborating the incident of rape. It is proved that the victim girl was subjected to sexual assault and she was ravished by accused No.1 and accused No.2 abetted the commission of rape by putting P.W. No.2/Soham under instant fear of death by putting an axe on his person. There was sufficient time for above said three witnesses to see both the accused and as such, all of them have identified both the accused before the court which is substantive evidence. As such, the above said citation is not any way helpful to the defence.

53. Holding of test identification parade is not a rule of law but rule of prudence. Even in absence of such identification parade, identification in court in present facts and circumstances can be relied upon.

54. The facts of the case in hand are important. In the present case, the victim girl had sufficient time to see the figure of both the accused, their complexion, their body condition and the clothes on their person. It is not a case of mistaken identity. The victim girl has identified both the accused before the trial Court. It is not enough. P.W. No.2/Soham and P.W. No.3/Rahul have also identified both the accused before the Court leaving aside test identification parade. In this context, reliance can be placed in case of ***Malkhansing Vs. State of Madhya Pradesh*** (supra) wherein the Hon'ble Supreme Court in Para No. 7 has observed as under :-

7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is

subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prasad vs. Delhi Administration).

55. In the present case, the victim girl, P.W.No.2/Soham and P.W.No.3/Rahul have not identified these duo accused for the first time before the Court. They have also identified both the accused during test identification parade. There was no reason for the victim girl to falsely implicate both the accused. They are not from same village. No enmity is brought on record. Similar is the case of P.W.No.2/Soham and P.W. No.3/Rahul. Why their substantive evidence regarding identification of both the accused before the Court should be discarded in view of decision in ***Malkhasingh*** (supra).

56. In view of the above factual scenario and substantive evidence of the victim girl, P.W.No.2/Soham and P.W. No.3/Rahul, I do not find any merit in the submissions of Mr Deshpande, learned counsel for the appellants/accused Nos. 1 and 2, so as to extend the benefit of doubt to

both the accused and set them free, on account of defects in the test identification parade.

57. The victim girl complaining of having been a victim of an offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars for the reason, that she stands on a much higher pedestal than a injured witness. It is well settled position of law that conviction can be based on the sole testimony of the prosecutrix/victim if it is implicitly reliable and there is a ring of true in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a guidance of prudence under particular facts and circumstances of the case. As discussed herein before the testimony of victim girl is fully corroborated by her boyfriend P.W. No.2/Soham and his friend P.W.No.3/Rahul. It is not enough that the evidence of victim girl is an offence of rape is supported by medical evidence keeping aside test identification parade, recovery of weapon, minor flaws in the investigation. The prosecution has been successful in proving all the charges against both the accused beyond reasonable doubt. At the time of incident, the victim girl was minor. As such, the learned trial Judge has rightly convicted the appellants under section 3 punishable with section 4, section 11 punishable with section 12 and under section 16 punishable with section 17 of the POCSO Act. The findings recorded by the learned Sessions Judge, Nandurbar are found proper and correct having regard to the proper appreciation of evidence of stock of witnesses. There is no perversity in the findings recorded by the learned Sessions Judge.

Certainly, there is no need to interfere with the findings and order of conviction recorded by the learned Sessions Judge.

58. Mr Deshpande, learned counsel for the appellants/accused prayed to reduce the period of sentence.

59. It is evident from the record that the offence of rape and offences under the provisions of POCSO Act have been committed on 14.12.2017. The learned Sessions Judge was pleased to award sentence under section 376(1) of the Indian Penal Code coupled with penal provision of POCSO Act for a term of 10 years rigorous imprisonment and fine of Rs.10,000/- with default stipulation, which is found to be minimum sentence.

60. The rape is a heinous crime. It insults womanhood. It violates the dignity of the woman and it erodes her honour. In ***State of A.P. Bodem vs. Sundara Rao reported in (1995) 6 SCC 230***, the Hon'ble Supreme Court has observed in para No. 9 as under :-

“9. In recent years, we have noticed that crime against women are on the rise. These crimes are affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate

punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act”.

61. In the present case, accused No.1 has committed rape on a minor girl, who was helpless by putting her boyfriend of instant death. Accused No. 2 has abetted the commission of offence of rape coupled with other offences by extending all help and as such, equally liable. There are no extraordinary circumstances or mitigating circumstances available on record which may justify imposition of sentence less than the minimum prescribed by the legislature under section 376(1) of the Penal Code and provisions of POCSO Act.

62. Needless to state that the criminal appeal needs to be dismissed.

ORDER

- (I) The Criminal Appeal stands dismissed.
- (II) Record and Proceedings be sent back to the Trial Court/Sessions Judge, Nandurbar as per procedure.

[SHRIKANT D. KULKARNI, J.]

mta